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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Communications Assistance	)	CC Docket No. 97-213
for Law Enforcement Act	)	
	)	

REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

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REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

In its opening comments filed in connection with the Commission's October 19, 1997 Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, Omnipoint Communications, Inc. ("Omnipoint") urged the Commission not to impose undue burdens and impractical procedures in prescribing rules to implement the Communications Assistance for Law Enforcement Act ("CALEA").[1] Virtually all of the commenters expressed similar views. Most commenters who addressed the proposed personnel security and recordkeeping requirements urged the Commission not to adopt them in their current form, with several taking the position that they are beyond CALEA's scope and, if adopted, might increase carrier liability. In addition, most commenters who addressed the proposed reporting requirement, *see* NPRM ¶ 27, urged the Commission not to adopt it. Also, most commenters set out reasons why CALEA's requirements do not apply to information services provided by telecommunications carriers. Finally, some commenters proposed that the Commission should use its authority under CALEA to issue blanket extensions of the Act's compliance deadlines until CALEA-compliant

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[1] Omnipoint's comments also addressed CALEA's definition of "telecommunications carrier" and criteria for Commission grants of extensions of compliance dates.

equipment is available from carriers regular equipment vendors. In these reply comments, Omnipoint supports and provides further analysis to support these arguments.

I. The Commission should not adopt the proposed personnel security and recordkeeping requirements.

Although many of Omnipoint's existing practices and policies already are reflected in several of the Commission's proposed personnel security and recordkeeping requirements, Omnipoint in its comments nevertheless opposed many of the Commission's proposed requirements because (1) they are contrary to the law or (2) they will be unduly burdensome and impractical if adopted. Many of the other commenters expressed similar views. *See, e.g.,* AT&T Comments at 28-37, Bell Atlantic Mobile Comments at 3-8, CTIA Comments at 25-27, GTE Comments at 7-10, SBC Comments at 9-10 & 15-23, 360 Communications Comments at 1-4, USTA Comments at 5-8, US West Comments at 13-33.

In addition, several commenters indicated that the personnel security and recordkeeping requirements are beyond CALEA's scope and that they could increase carrier liability. These persuasive arguments provide additional grounds for the Commission to modify substantially the rules it proposed pursuant to section 105 of CALEA.

A. These requirements are beyond CALEA's scope.

The Commission identifies CALEA's section 105 as the source of authority for promulgating the proposed personnel security and recordkeeping requirements Several commenters stated that the Commission reads far too much into CALEA's section 105. *See* AT&T Comments at 34, CDT Comments at 7-18. Omnipoint agrees that the text, structure, and legislative history of CALEA demonstrate that section 105 was drafted only to ensure that law enforcement would not have the capability to activate a wiretap remotely without affirmative carrier intervention. Therefore, section 105 fails to provide the Commission with the requisite basis for promulgating detailed personnel security and recordkeeping requirements.

CDT's analysis of why these proposed requirements are beyond CALEA's scope, *see* CDT Comments at 7-18, is particularly illuminating because the author of its comments was a key congressional counsel responsible for drafting CALEA.[2]

B. The Commission's overbroad requirements could increase carrier liability.

A carrier's duties under CALEA were not intended to affect its liability under other statutes such as 18 U.S.C §§ 2511, 2520. Section 105 of CALEA merely reiterates a carrier's duty to take reasonable measures to prevent misdeeds by its employees in the area of wiretaps. The Commission's rules implementing section 105 could expand the scope of carriers' vicarious liability. *See* US West Comments at 44. For example, in considering whether to impose liability on a carrier under 18 U.S.C §§ 2511, 2520, a court could take into account the carrier's compliance with the Commission's rules. *Accord* FBI Comments at 18-19 n. 24 ("if carriers fail to comply with the regulations, such noncompliance . . . will tend towards imposition of vicarious liability"). Yet, the Commission's rules, upon which this liability would be imposed, could be more detailed or rigid than necessary to comply with sections 2511 or 2520.

C. The Commission's overbroad requirements are unnecessary.

Finally, the potential for liability is sufficient incentive for carriers to develop internal policies and practices. For example, carriers routinely maintain business records to show their good faith compliance with lawful authorization to conduct surveillance in the event a civil claim is brought under 18 U.S.C. § 2520. Carriers themselves are best able to determine what steps,

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[2] James X. Dempsey, now Deputy Director of CDT, was then subcommittee counsel to Rep. Don Edwards, then chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights and House sponsor of CALEA. *See* Joint Hearing on Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Hearings Before the Subcomm. on Technology and Law of the Senate Judiciary Comm. and the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 103d Cong., 2d Sess. 114 (1994) (testimony of Louis Freeh, Director of the FBI) (recognizing the contributions of Mr. Dempsey and other congressional counsel in the drafting of the legislation).

unique to their own organization's operational structures and procedures, will provide the greatest degree of protection. The Commission proposals, however, go well beyond any record a carrier might maintain for business purposes. A carrier's ordinary business records should be sufficient to satisfy any of its CALEA obligations. *See, e.g.*, AT&T Comments at 34, USTA Comments at 6.

II. The Commission should not adopt the proposed reporting requirement.

Referencing an FBI proposal, the Commission requested comment on a rule that would require carriers to report all illegal wiretapping and compromises of the confidentiality of an interception. *See* NPRM ¶ 27. Virtually all carriers who commented on this proposed reporting requirement opposed it. *See, e.g.*, Ameritech Comments at 4-5, AT&T Comments at 33-34, Bell Atlantic Mobile Comments at 4-5, BellSouth Comments at 9-10, NTCA Comments at 3. Omnipoint also opposes a Commission-imposed reporting requirement.

A. A requirement that carriers report unlawful interceptions and breaches of confidentiality could be used to increase carriers' risks of incurring penalties under title 18, United States Code.

A company's disclosure that its premises were used or its employees were involved in an unlawful interception or compromise of the confidentiality of an interception might open the company up to civil and criminal liabilities under title 18 of the United States Code. The Commission's principal authority for promulgating regulations, however, lies in title 47 not title 18 of the United States Code. Consequently, unless CALEA grants the Commission the requisite authorization, a rule establishing a reporting requirement cannot operate to alter or modify civil and criminal liabilities that might arise under title 18. *See* Sprint Spectrum Comments at 2-3.

CALEA does not grant the Commission the requisite authorization to alter or modify civil and criminal liabilities that might arise under title 18. A review of CALEA reveals no provision that authorizes the Commission to establish presumptions that the courts will respect in reviewing possible carrier liabilities under title 18.

Nor does the FBI, which has proposed the requirement, identify any such authority. Indeed, the FBI in its comments, at 20-21, provides no support for the proposition that the Commission has the authority to impose a self-reporting requirement. Instead, the FBI merely sets out policy arguments more appropriately directed to the United States Congress and its Judiciary Committees, which has the authority to offer effective incentives or otherwise affect the liabilities that might arise under title 18.

In summary, mandatory reporting could be used to increase carriers' risks of incurring penalties under title 18.

B. Unlike programs operated by other federal agencies that create incentives for self-reporting, the FCC lacks the authority to offer effective incentives or otherwise affect the liabilities that might arise under title 18, United States Code.

Other federal government self-reporting regimes offer strong incentives to disclosing suspected violations of law by reducing the reporting entity's potential liability. For example, the Environmental Protection Agency has a policy whereby it does not recommend for criminal prosecution and waives or substantially reduces the gravity component of civil penalties for those regulated entities who voluntarily discover, report, and promptly correct violations of environmental requirements. *See* 60 Fed. Reg. 66706 (Dec. 22, 1995). Similarly, under the Anti-Kickback Act of 1986, a government contractor's conduct in reporting a violation of the Act is "favorable evidence" in any administrative or contractual action to suspend or debar the contractor. *See* 41 U.S.C. § 57(c)(2).

The Commission lacks the authority enjoyed by other federal agencies, as the authority for such incentives is not set forth in CALEA or in title 47, United States Code. Only Congress can provide the Commission with the requisite authority.

C. A Commission-imposed self-reporting requirement is unnecessary.

Finally, carriers have significant incentives to report a compromise of the confidentiality of an interception and unlawful interceptions to law enforcement. For example, failure to report a compromise of the confidentiality of an interception might constitute aiding and abetting in the

obstruction of justice. On the other hand, self-reporting is a factor that is favorably considered in making prosecutorial and sentencing decisions. *See* US West Comments at 45-46. Consequently, existing law already provides telecommunications carriers with sufficient incentives to decide when and to whom to report compromises of the confidentiality of an interception and unlawful interceptions.

III. CALEA's requirements do not apply to information services provided by telecommunications carriers.

In its discussion of information services, the Commission focused on entities rather than services. *See* NPRM ¶ 20. The Commission observed that entities that "exclusively" provide information services are excluded from CALEA's requirements, concluded that carriers offering "calling features associated with telephone services" are subject to CALEA's requirements, and asked for comments on the applicability of CALEA's requirements to information services provided by common carriers.

Implicitly acknowledging that the two statutory exemptions for "information services" focus on services rather than entities, the FBI agrees with the Commission that CALEA's requirements apply to calling features associated with telephone services and contends that the requirements should also apply to telecommunications services used to access information services. *See* FBI Comments at 14-15. The FBI concedes that CALEA's requirements do not apply to information services provided by common carriers. The other commenters also believe that CALEA's requirements do not apply to information services provided by common carriers. *See* Ameritech Comments at 2-3, AT&T Comments at 39-41, CDT Comments at 21-22, CTIA Comments at 24-25, NTCA Comments at 2, Paging Network Comments at 3-5, USTA Comments at 5, US West Comments at 6-13.

The statute's text and structure excludes information services from the category of services covered by CALEA in two ways. First, section 102(8)(c) defines the term "telecommunications carrier" to exclude "persons or entities *insofar* as they are engaged in

providing information services." Second, section 103 contains a subsection entitled "limitations" that expressly states that CALEA's capabilities requirements "do not apply to . . . information services." *See* 47 U.S.C. 1002(b)(2)(A).

The section 102 exclusion would have been superfluous if an information services exclusion were to apply only to entities that "exclusively" provide information services. The carve out from the definition of telecommunications carriers was needed because the term otherwise applies to carriers that fall into one of the specified categories and also provide information services. Consistent with the fact that companies providing information services may also be engaged in other activities, the section 103 exclusion explicitly excludes information services as opposed to information service providers from CALEA's capability requirements. The limitation is unqualified; it does not distinguish between the types of providers offering information services.

The legislative history further supports the conclusion that CALEA's requirements do not apply to information services provided by common carriers. For example, when the committee report states that "[t]he storage of a message in a voice mail or E-mail 'box' is not covered by the bill,"[3] it underscores that Congress focused on the service without distinguishing between entities that provide it.

Consequently, the Commission should conclude that the CALEA exemptions for information services are not limited to those entities that "exclusively" provide such services.

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[3] H. Rep. No. 827, 103d Cong., 2d Sess. 23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3503.

IV. The Commission should extend CALEA's compliance deadline on a blanket basis until compliant equipment is available from each carrier's regular equipment vendor

In its opening comments, Omnipoint suggested that the Commission use the availability of CALEA-compliant equipment from the vendor that supplies the carrier with facilities equipment as an additional factor in considering whether it is reasonably achievable for a petitioner to comply with the capability requirements within the compliance time period. Some other commenters proposed that the Commission should use its authority under 47 U.S.C. § 1006(c) to issue blanket or automatic extensions of CALEA's compliance deadlines until CALEA-compliant equipment is available from carriers regular equipment vendors. *See, e.g.,* AT&T Comments at 27-28, Bell Atlantic Mobile Comments at 8-9, BellSouth Comments at 15-16, CTIA Comments at 8, PCIA Comments at 3-6. Omnipoint agrees that blanket or automatic extensions are in the public interest because no carrier can adhere to the assistance capability requirements until CALEA-compliant equipment is commercially available.

Respectfully submitted,

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Date: February 11, 1998

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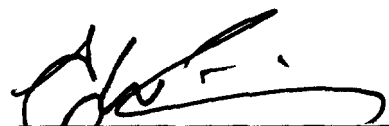

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